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7 CLEAR-VIEW TECHNOLOGIES, INC.,  
8 Plaintiff,  
9 v.  
10 JOHN H. RASNICK, et al.,  
11 Defendants.  
12

Case No. [13-cv-02744-BLF](#)

**ORDER:**

**(1) GRANTING IN PART PLAINTIFF'S MOTION TO STRIKE THE EXPERT REPORT OF JAMES A. TURNER AND EXCLUDE HIS TESTIMONY;**  
**(2) GRANTING PLAINTIFF'S MOTION TO STRIKE THE EXPERT REPORT OF EARL MCCUNE AND EXCLUDE HIS TESTIMONY**

[Re: ECF 153]

14 On October 30, 2014, the Court modified the schedule in this case with regard to expert  
15 discovery. The schedule required the parties to disclose their initial experts and exchange expert  
16 reports no later than February 17, 2015; disclose rebuttal experts and exchange rebuttal expert  
17 reports no later than March 17, 2015; and set an expert discovery cutoff date of April 14, 2015.  
18 See ECF 111 at 2 (adopting Plaintiff's proposed schedule, at ECF 105-6, with minor  
19 modifications).

20 On February 17, 2015, Plaintiff produced to Defendants the expert report of Dr. Jonathan  
21 Neuberger. Dr. Neuberger's report set forth his expert opinions regarding Plaintiff's valuation on  
22 June 17, 2011, prior to the alleged misconduct of Defendants that gives rise to this suit.  
23 Defendants did not produce an initial expert report by this date. But on March 17, 2015, the last  
24 day to disclose and exchange rebuttal reports, Defendants timely disclosed the rebuttal expert  
25 report of James A. Turner, which professed to rebut Dr. Neuberger's valuation of CVT. The  
26 Turner Report included as an exhibit an additional report by Dr. Earl McCune entitled "Analysis  
27 of Failed Technology Utilized by Clear-View Technologies, Inc." See ECF 153-6 Exh. B. Dr.  
28 McCune, a specialist in wireless communications and radio frequency technology, set forth in this

1 report his opinion that the radio frequency system employed by CVT's product The BarMaster  
2 was "fatally flawed." *See id.* at 4.

3 Plaintiff now moves to strike the entirety of the McCune Report and portions of the Turner  
4 Report, as well as exclude their related testimony at trial, on several grounds. First, Plaintiff seeks  
5 to strike the McCune Report for three reasons: (1) McCune's disclosure as an expert was untimely  
6 because his opinions are affirmative expert opinions rather than rebuttal opinions; (2) the Report  
7 exceeds the scope of authorized rebuttal; and (3) Defendants cannot show that the failure to  
8 disclose McCune was substantially justified or harmless. Plaintiff further seeks to prohibit Turner  
9 from relying on the McCune Report in his own testimony and report, and also asks the Court to  
10 strike several improper arguments and conclusions of fact and law from the Turner Report.

11 The Court heard oral argument on this motion at the parties' pretrial conference on May  
12 28, 2015. Having considered the written and oral arguments of the parties, as well as the  
13 governing law, the Court GRANTS Plaintiff's motion to strike the McCune Report in its entirety,  
14 and GRANTS IN PART Plaintiff's motion to strike portions of the Turner Report.<sup>1</sup>

## 15 **II. LEGAL STANDARD**

16 Federal Rule of Civil Procedure 26 governs parties' disclosure obligations. The Rule  
17 demands that parties "make [their] disclosures at the times and in the sequence that the court  
18 orders." Fed. R. Civ. P. 26(a)(1)(D). A party need not disclose an expert within the deadline for  
19 initial expert reports, and can instead disclose an expert as a "rebuttal expert," when the expert's  
20 testimony is "intended solely to contradict or rebut evidence on the same subject matter identified  
21 by an initial expert witness." *R & O Constr. Co. v. Rox Pro Int'l Grp., Ltd.*, 2011 WL 2923703, at  
22 \*2 (D. Nev. July 18, 2011). "The function of rebuttal testimony is to explain, repel, counteract or  
23 disprove evidence of the adverse party." *Marmo v. Tyson Fresh Meats, Inc.*, 457 F.3d 749, 759  
24 (8th Cir. 2006).

25  
26 <sup>1</sup> Plaintiff also seeks its fees and costs related to bringing this motion. The Court DENIES this  
27 request. *Cf. Yeti by Molly Ltd. v. Deckers Outdoor Corp.*, 259 F.3d 1101, 1106 (9th Cir. 2001)  
28 (noting that the district court has "wide latitude" to issue sanctions under Rule 37(c)). Here, the  
Court finds that excluding Dr. McCune from testifying and striking his Report is a sufficient  
sanction for Defendants' failure to comply with Rule 26.

1        If the rebuttal expert's testimony is offered, however, to "contradict an expected and  
2 anticipated portion of the other party's case-in-chief, then the witness is not a rebuttal witness or  
3 anything close to one." *Amos v. Makita U.S.A.*, 2011 WL 43092, at \*2 (D. Nev. Jan. 6, 2011)  
4 (citing *In re Apex Oil Co.*, 958 F.2d 243, 245 (8th Cir. 1992)); *see also Yeti by Molly, Ltd. v.*  
5 *Deckers Outdoor Corp.*, 259 F.3d 1101, 1105-06 (9th Cir. 2001) (affirming the trial court's  
6 exclusion of an expert who was improperly disclosed as a rebuttal expert); *cf. Luke v. Family Care*  
7 & *Urgent Med. Clinics*, 323 Fed. App'x 496, 498-99 (9th Cir. 2009). Although a defendant need  
8 not put forth expert opinions to challenge affirmative theories on which the plaintiff bears the  
9 burden of proof, such as damages, a defendant's rebuttal expert is limited to offering opinions  
10 rebutting and refuting the theories set forth by plaintiff's expert(s). *See, e.g., Cates v. Sears,*  
11 *Roebuck & Co.*, 928 F.2d 679, 685 (5th Cir. 1991).

12        A party that, without substantial justification, fails to properly disclose information as  
13 required by Rule 26(a) may not "unless such failure is harmless, [] use as evidence at trial . . . any  
14 witness or information not so disclosed." Fed. R. Civ. P. 37(c)(1). "The sanction is *automatic and*  
15 *mandatory* unless the sanctioned party can show that its violation . . . was either justified or  
16 harmless." *R & O Constr.* at \*3 (citing *Salgado v. Gen. Motors Corp.*, 150 F.3d 735, 742 (7th Cir.  
17 1998)) (emphasis added).

18        **III. DISCUSSION**

19            **A. The McCune Report**

20        It is undisputed that McCune was not disclosed prior to the Court's February 17, 2015  
21 deadline to disclose initial expert reports. As such, the McCune Report survives only if it is  
22 properly considered rebuttal. *See* Fed. R. Civ. P. 37(c)(1); *R & O Constr.* at \*3.

23        Defendants make several arguments in an attempt to save the McCune Report. First,  
24 Defendants contend that the McCune Report is "undoubtedly within the permissible scope of  
25 rebuttal," because it discusses the "same subject matter" as the Neuberger Report offered by  
26 Plaintiff. *See* Opp., ECF 173 at 9, 11 ("The McCune Findings are set forth strictly for purposes of  
27 Turner's valuation of CVT as of June 17, 2011. The unfeasible BarMaster product contributed to  
28 Turner's valuation of CVT as being worthless."). Second, Defendants argue the McCune Report

1 rebuts Dr. Neuberger's assumptions that The BarMaster could be "finished" and placed on the  
2 market as a viable product. *See* Opp. at 12 ("Having opined that CVT could complete the  
3 BarMaster, and having opined that the BarMaster possessed certain desirable features, CVT  
4 cannot now prevent Defendants from producing relevant, admissible rebuttal evidence."). Third,  
5 Defendants argue that the McCune Report is "properly relied on" by Turner in his expert report  
6 because "[f]or valuation analysts, the use of consultants is a widely-held custom and practice, one  
7 that is permitted under accounting guidelines and case authority." Opp. at 13. Fourth, Defendants  
8 argue that the McCune Report must be stricken because it relies almost exclusively on the  
9 inadmissible hearsay testimony of three third-party witnesses (Messrs. Cano, Wyatt, and Simpson)  
10 and Defendant Parker Mattingly. *See* Pl.'s Mot. at 15-19. The Court considers each of these  
11 arguments in turn, and finds them unpersuasive.

12 **1. The McCune Report is Not a Rebuttal Expert Report**

13 Defendants' first and second arguments, that the McCune Report opines on the "same  
14 subject matter" as the Neuberger Report and rebuts the Neuberger Report's conclusion that The  
15 BarMaster was a viable product, are really one in the same: Defendants contend that McCune's  
16 Report is properly considered rebuttal. Defendants are incorrect, however, for several reasons.

17 First, the sum and substance of Dr. McCune's Report, that The BarMaster did not work,  
18 speaks directly to Defendants' affirmative defenses and counterclaims, on which Defendants bear  
19 the burden of proof. A review of Defendants' Amended Answer, ECF 81, makes this clear.  
20 Defendants' nineteenth affirmative defense states that "Plaintiff has breached the contracts alleged  
21 in the First Amended Complaint by *failing to bring a viable product into the market.*" Am.  
22 Answer, ECF 81 at 19. Defendants further assert a breach of contract counterclaim, alleging that  
23 Plaintiff breached the terms of the parties' distribution agreement by "failing to manufacture or  
24 cause to be manufactured, promote and sell the product, and to *develop into a successful*  
25 *production for distribution*" The BarMaster. *See id.* at 21. Defendants bear the burden of proof as  
26 to all elements of this affirmative defense and counterclaim – because the McCune Report  
27 includes extensive expert opinion as to the workability and viability of The BarMaster, the report  
28 speaks directly to an issue on which Defendants bear the burden of proof, and cannot be properly

1 construed as a rebuttal report. *See, e.g., R & O Constr.* at \*3.

2 A review of Defendants' initial discovery disclosures shows that Defendants recognized  
3 their burden to produce *initial* expert testimony as to these affirmative claims. In September 2014,  
4 Defendants indicated in their initial expert disclosures that they intended to offer expert testimony  
5 regarding the technical feasibility of The BarMaster. *See Tilley Decl.*, ECF 153-3 at ¶ 2 (a copy of  
6 Defendants' initial expert disclosures, which disclosed that Defendants "may rely upon expert  
7 testimony at the time of trial on the following topics: (1) Scope and calculation of damages sought  
8 by Plaintiff; (2) Status of the BarMaster product during the relevant time period, *including*  
9 *assessment of feasibility for mass production for purposes of distribution and sales*"') (emphasis  
10 added). The disclosure deadline passed for the parties to disclose their affirmative experts on "all  
11 issues on which [the] disclosing party bears the burden of proof," which clearly included this  
12 affirmative defense and counterclaim, and Defendants failed to disclose an expert, instead waiting  
13 until Plaintiff produced its damages expert report to offer such testimony as purported rebuttal.  
14 Had Dr. McCune been offered as an initial expert witness, Plaintiff could have designated an  
15 expert to rebut Dr. McCune's opinions, and these dueling experts could have been put in front of a  
16 jury. In this circumstance, however, Defendants' actions evince the intent to play fast-and-loose  
17 with Rule 26's requirements to the detriment of Plaintiff, which the Court will not countenance.

18 In their opposition to Plaintiff's motion and again at oral argument on the motion,  
19 Defendants offered to dismiss their affirmative defenses and counterclaims in an attempt to save  
20 the McCune Report and Dr. McCune's ability to testify at trial. Defendants claimed that such a  
21 dismissal would render the McCune Report "solely for impeachment" purposes. *See, e.g., Opp.*,  
22 ECF 173 at 17. Defendants are incorrect – even if Defendants dismissed their affirmative defenses  
23 and counterclaims, the McCune Report would still not be a rebuttal report, for several reasons.

24 First, and most glaring, is the fact that Dr. McCune *never reviewed the Neuberger Report*,  
25 which he is purportedly being offered to rebut, prior to drafting his own expert report. *See*  
26 McCune Depo. Tr., Tilley Decl., ECF 176-6 at 44-45 (Pl.'s counsel: "Are you familiar with a  
27 report that was prepared by Dr. Neuberger in this case?" Dr. McCune: "No." Pl.'s counsel: You  
28 haven't reviewed that at any time?" Dr. McCune: Haven't seen anything."). Courts have

1 repeatedly held that an expert is improperly designated as a rebuttal expert when he has failed to  
2 review the initial expert report, or “otherwise [failed to] indicate that he was aware of” the  
3 opinions offered by the initial expert. *See, e.g., Houle v. Jubilee Fisheries, Inc.*, 2006 WL 27204,  
4 at \*3, \*3 n.4 (W.D. Wash. Jan. 5, 2006) (stating that plaintiff’s expert, who failed to mention, cite,  
5 or otherwise indicate that he was aware of the opinions of defendant’s expert “is not a rebuttal  
6 expert”); *see also Amos v. Makita* at \*1 (“The Ninth Circuit has held that rebuttal experts are not  
7 rebuttal experts if the testimony they give does not address or rebut previously disclosed expert  
8 testimony.”). Such a rule makes sense: an expert cannot be said to “rebut” testimony he or she has  
9 never seen or reviewed. *See, e.g., Houle* at \*3 n.4.

10 Second, even if the Court were to disregard this glaring issue – which alone is a sufficient  
11 reason to strike Dr. McCune’s Report – a review of the McCune Report alongside the Neuberger  
12 Report makes plain that Dr. McCune’s opinions are not rebuttal opinions, nor are they offered on  
13 the “same subject matter” as the Neuberger Report. Dr. Neuberger’s report includes no technical  
14 analysis of The BarMaster, but rather presents a sales projection in order to value CVT at the time  
15 of the alleged tortious interference. Though Dr. Neuberger’s valuation assumes that The  
16 BarMaster was a viable product – and, in fact, that CVT would be able to implement a new, more  
17 efficient version of The BarMaster, thus improving sales, *see ECF 153-4 ¶ 30* – the question of  
18 whether The BarMaster worked, and could in fact be sold to, and installed in, businesses such as  
19 202 Market, was not raised by Dr. Neuberger’s expert report, but instead is a primary element of  
20 Plaintiff’s case-in-chief and Defendants’ affirmative defenses and counterclaims. Plainly, whether  
21 The BarMaster worked goes to the heart of the dispute between these parties. “If the purpose of  
22 expert testimony is to contradict an expected and anticipated portion of the other party’s case-in-  
23 chief, then the witness is not a rebuttal witness or anything analogous to one.” *Amos v. Makita*, at  
24 \*2 (citing *In re Apex Oil Co.*, 958 F.2d at 245). Permitting Defendants to backdoor such expert  
25 testimony under the guise of “rebuttal” testimony would render Rule 26’s limits generally  
26 meaningless, and permit Defendants to engage in substantial gamesmanship – something Rule 26  
27 was designed to combat, not foster.

28 Defendants could have disclosed Dr. McCune as an initial expert to offer opinions on

1 whether The BarMaster actually worked as Plaintiff claimed. When a party's case, particularly  
2 with regard to damages, relies in part on the workability of a product, Defendants can be expected  
3 to introduce such expert testimony – this is particularly true when Defendants assert counterclaims  
4 or affirmative defenses which rely on proving that the product did not work. What a party cannot  
5 do, however, is exactly what Defendants did here – despite knowing that Plaintiff in its case-in-  
6 chief would argue that The BarMaster was workable and valuable, which was made clear from the  
7 very first page of Plaintiff's initial Complaint in this action, *see* ECF 1 at 1, Defendants attempted  
8 to sandbag Plaintiff by enclosing Dr. McCune's technical report as an appendix to the Turner  
9 rebuttal report. This behavior runs afoul of the purpose and plain language of Rule 26, and cannot  
10 be countenanced. *See, e.g., Vu v. McNeil-PPC, Inc.*, 2010 WL 2179882, at \*2 (C.D. Cal. May 7,  
11 2010) ("If the phrase 'same subject matter' is read broadly to encompass *any* possible topic that  
12 *relates* to the subject matter at issue, it will blur the distinction between 'affirmative expert' and  
13 'rebuttal expert.' More importantly, such broad reading of Rule 26(a)(2)(C)(ii) will render the  
14 scope of the subject matter limitless and will lead to unjust results.") (emphasis in original); *Cf.*  
15 *also Cates* at 685.

16 Because McCune was not disclosed as an affirmative expert, his report must be stricken  
17 and he must be prohibited from testifying under Rule 37 unless Defendants make a showing that  
18 the failure to disclose was harmless or substantially justified. Fed. R. Civ. P. 37(c)(1); *R & O*  
19 *Constr.* at \*3. Defendants did not attempt to make such a showing in their opposition. As such,  
20 McCune was not properly disclosed pursuant to Rule 26, and Rule 37(c)(1) demands that his  
21 report be STRICKEN and that he not be permitted to testify at trial. *See, e.g., id.*

22 **2. The McCune Report is Inadmissible as an Appendix to the Turner  
23 Report, and Turner Cannot Testify as to McCune's Findings**

24 Defendants' third argument, that McCune's report is nonetheless admissible as an  
25 appendix to the Turner Report because Dr. McCune is the type of expert on which Turner could  
26 reasonably be expected to rely, is also unpersuasive. It is axiomatic that an expert, "however well  
27 credentialed, is not permitted to be the mouthpiece of a scientist in a different specialty." *Dura*  
28 *Auto Sys. of Ind., Inc. v. CTS Corp.*, 285 F.3d 609, 614 (7th Cir. 2002); *see also Am. Key Corp. v.*

1        *Cole Nat'l Corp.*, 762 F.2d 1569, 1580 (11th Cir. 1985) (“Expert opinions ordinarily cannot be  
2        based upon the opinions of others whether those opinions are in evidence or not.”). Defendants  
3        have not shown how McCune, as an expert in radio frequency systems, is the type of expert on  
4        which Turner, as a Certified Public Accountant, would normally rely in offering expert opinions.

5        Defendants cite to *Ohio Environmental Development Limited P'ship v. Envirotest Society*  
6        *Corp.*, a 2007 case from the Northern District of Ohio, in support of their theory, but the Court  
7        finds the case distinguishable. There, the district court held that a real estate appraiser offered as  
8        an expert could reasonably rely on calculations made by an architect, because such data would be  
9        normally relied on by “experts in [the] field of appraisal in forming opinions on the diminution of  
10       the market value of property resulting from deferred maintenance.” 478 F. Supp. 2d 963, 975  
11       (N.D. Ohio 2007). First, *Ohio Environmental*’s ruling is consistent with the “great liberality” the  
12       Sixth Circuit affords to experts under Rule 703, *see id.* at 974, a liberality that courts in the Ninth  
13       Circuit have not adopted. *See, e.g., Vaxiion Therapeutics, Inc. v. Foley & Lardner LLP*, 2009 WL  
14       1292913, at \*4 (S.D. Cal. May 6, 2009) (rejecting *Ohio Environmental*’s reading of Rule 703, and  
15       further stating that “nothing in Rule 703 suggests that an expert may rely on evidence the Court  
16       has *expressly precluded*.”) (emphasis added). Second, the district court in *Ohio Environmental*  
17       found that the real estate appraiser had personally checked the architect’s work, “[a]s opposed to  
18       blindly accepting [his] calculations.” *Id.*

19        Defendants cannot show that CPAs regularly rely on scientific experts such as Dr. McCune  
20        when determining a business’s valuation. Nor does Turner state in his report that he independently  
21        attempted to verify McCune’s work, or that he would be qualified to do so. Instead, Turner  
22        testified that his understanding of the radio frequency technology employed by The BarMaster  
23        came from McCune’s Report. *See* Turner Depo. Tr., Tilley Reply Decl. at 86:4-24. There is a  
24        sharp difference between a real estate appraiser relying on the opinions of an architect – two  
25        related professions that involve similar expertise – and a CPA relying on, and then repeating, the  
26        opinions of a scientific technical expert in a wholly different field with which the CPA has neither  
27        familiarity or expertise. *See Dura* at 614. For that reason, Turner may not rely on the McCune  
28        Report when rendering his own expert opinions, in either his Report or in testimony. Turner is

1 free to testify that he has seen no evidence to support an assumption that The BarMaster is a viable  
2 product, but he may not rely on McCune's Report to support such an opinion. *See, e.g., id.*

3 **3. Defendants' Undisclosed "Impeachment" Witnesses Cannot Testify at**  
4 **Trial Because Their Testimony is Direct Evidence Relating to**  
5 **Defendants' Counterclaims and Affirmative Defenses**

6 In their opposition, Defendants further argue that three other fact witnesses, Messrs. Cano,  
7 Wyatt, and Simpson, should be allowed to testify to impeach Mr. Mula's anticipated testimony  
8 about the success of an installation of The BarMaster at a Roanoke, Virginia establishment called  
9 202 Market. Neither Cano nor Wyatt were disclosed by Defendants pursuant to Rule 26.

10 Plaintiff makes two arguments with regard to these witnesses. First, it argues that the  
11 McCune Report is inadmissible because it relies almost exclusively on this hearsay testimony,  
12 which would be inadmissible. *See* Pl.'s Mot. at 16-17. Because the Court strikes the McCune  
13 Report, and precludes Dr. McCune from testifying at trial, this argument is moot. Second, Plaintiff  
14 argues that Cano and Wyatt are not impeachment witnesses because their testimony would be  
15 offered as direct evidence that The BarMaster did not work – evidence that would speak to  
16 Defendants' counterclaims and affirmative defenses. *See* Pl.'s Reply at 9.

17 The Court agrees with Plaintiff. Though Defendants argue that Wyatt and Cano will testify  
18 only as impeachment witnesses, they argue that they intend to call these witnesses in order to  
19 contradict testimony by CVT that the 202 Market installation was "finished in 2011" and "fully  
20 functioning." *See* Opp. at 15. Defendants are correct that witnesses who are called solely for  
21 impeachment purposes need not be disclosed pursuant to Rule 26, but Defendants' description of  
22 the testimony to be offered by these witnesses shows that their testimony would not be solely for  
23 impeachment and would instead be directly related to Defendants' affirmative defenses and  
24 counterclaims – matters on which Defendants bear the burden of proof.

25 Evidence is "solely for impeachment" when it "has value solely for the purpose of  
26 impeaching a witness." *Robert Kubicek Architects & Assocs., Inc. v. Bosley*, 2013 WL 998222, at  
27 \*2 (D. Ariz. Mar. 13, 2013). If evidence instead "has independent relevancy to the merits of the  
28 case, [the evidence] is not 'solely for impeachment' and must be disclosed to opposing counsel"

1 pursuant to Rule 26. *Id.* (citing *Klonoski v. Mahlab*, 156 F.3d 255, 270 (1st Cir. 1998)); *see also*  
2 *Wilson v. AM Gen. Corp.*, 167 F.3d 1114, 1122 (7th Cir. 1999) (finding that when a witness will  
3 offer testimony related to a “primary line of defense” in the suit, the witness is not offered solely  
4 for impeachment purposes). Here, evidence that the 202 Market installation did not work, or was  
5 otherwise not fully functional, is not impeachment evidence because it has independent relevance  
6 beyond impeaching Mr. Mula or any other CVT witness – the testimony goes directly to  
7 Defendants’ breach of contract counterclaims and affirmative defenses, which require Defendants  
8 to prove that Plaintiff did not bring a viable product to market. *See Valiavicharska v. Tinney*, 2012  
9 U.S. Dist. LEXIS 11334, at \*5 (“‘Impeachment’ as contemplated by the Rule 26(a) exception  
10 refers to *attacks on the credibility of a witness and not to rebuttal evidence*, which tends to prove  
11 any element of [a party’s] claims.”) (emphasis added). Defendants may not seek to introduce these  
12 witnesses under the guise of impeaching Mr. Mula’s credibility when the witness would actually  
13 testify about the effectiveness of the 202 Market installation and the workability of The  
14 BarMaster.

15       Messrs. Cano and Wyatt are not being offered “solely for impeachment,” and needed to be  
16 disclosed by Defendants pursuant to Rule 26. Because Defendants did not do so, both witnesses  
17 must be precluded from testifying, pursuant to Rule 37.

18       Defendants argued at the hearing on this motion that, were they to dismiss their  
19 counterclaims and affirmative defenses, Wyatt and Cano’s testimony would be rendered solely for  
20 impeachment purposes. The Court DEFERS ruling on such a request to offer Wyatt and Cano’s  
21 testimony as impeachment evidence until (1) Defendants dismiss their counterclaims and  
22 affirmative defenses and (2) the Court hears the testimony Defendants would seek to impeach.<sup>2</sup>  
23 *Even if* Defendants were to dismiss their counterclaims and affirmative defenses, Messrs. Wyatt  
24 and Cano may still be precluded from testifying if the Court determines that their testimony is not  
25 offered solely for impeachment purposes.

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<sup>2</sup> Further, it would be unjust to conditionally deny Plaintiff’s motion on the mere offer that  
28 Defendants will dismiss their affirmative defenses and counterclaims. Defendants may, at any  
time, dismiss their counterclaims and affirmative defenses, but such a dismissal is no guarantee  
that the Court will permit Wyatt and Cano to testify.

1                   **B.       The Turner Report**

2                   Because the Court strikes the McCune Report, Turner may not testify regarding The  
3 BarMaster's technical flaws. This is because Turner himself does not have any expertise in radio  
4 frequencies or wireless communications, and stated in his deposition testimony that his technical  
5 knowledge of The BarMaster came from Dr. McCune's Report. *See, e.g.*, Turner Depo. Tr. at  
6 86:4-24; *see also Dura* at 614.

7                   Plaintiff also seeks to strike and exclude portions of the Turner Report which it argues  
8 "go[] far beyond the scope of authorized rebuttal." Pl.'s Reply at 10. At oral argument on the  
9 motion, Plaintiff pointed to several specific portions of the Turner Report that it sought to strike:  
10 (1) Turner's legal conclusions that CVT was a Ponzi scheme, that CVT failed to mitigate its  
11 damages, and that certain portions of the Neuberger Report had "no evidentiary value"; and (2)  
12 Turner's testimony that CVT had "no patentable technology."

13                   As discussed by the Court at oral argument, the Court agrees with Plaintiff that these  
14 statements each go beyond the permissible scope of expert testimony. With regard to Turner's  
15 legal conclusions, the Court STRIKES the section of Turner's Report which states that CVT failed  
16 to mitigate its damages, *see* Turner Report, Part V.C at 16-17, and the portions of his Report  
17 which state that the Neuberger Report lacks evidentiary value. Further, the Court STRIKES  
18 Turner's statement that "CVT had the elements of a [P]onzi scheme," *id.* at 17, because Turner's  
19 Report points to no evidence that money was being raised by CVT's leadership in order to pay  
20 amounts due to other earlier investors. The phrase "Ponzi scheme" is a loaded term that Turner  
21 and Defendants shall not be permitted to put before a jury without such evidentiary support.

22                   As to Turner's opinion that CVT had "no patentable IP," *see* Turner Report at 17, the  
23 Court limits Turner's opinion and testimony to statements that CVT held no issued patents, but  
24 otherwise excludes his opinion that CVT and its owners had no patentable technology. Turner  
25 professed no expertise in patents and cannot serve as a mouthpiece for McCune's analyses of  
26 Plaintiff's patent applications. *See, e.g.*, *Dura* at 614. The Court otherwise DENIES Plaintiff's  
27 motion to strike the Turner Report.

1           **IV. ORDER**

2           For the foregoing reasons, IT IS HEREBY ORDERED that:

3           1.       The McCune Report is STRICKEN, and McCune cannot testify at trial.

4           2.       Turner may not rely on the opinions offered in the McCune Report in his testimony

5                   at trial, and any reference by Turner to McCune's opinions is STRICKEN.

6           3.       Messrs. Wyatt and Cano are precluded from testifying at trial.

7           4.       The Turner Report is STRICKEN IN PART as to the legal conclusions contained

8                   within and its opinion that CVT or its owners lacked patentable technology, and

9                   Turner shall not be permitted to testify at trial as to these opinions. Plaintiff's

10                  motion to strike the Turner Report is otherwise DENIED.

11           **IT IS SO ORDERED.**

12           Dated: June 3, 2015

13             
14           BETH LABSON FREEMAN  
United States District Judge